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Legal Rules and Social Reform

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I. INTRODUCTION

Modern legal scholarship has lofty ambitions for law. Some would enlist the courts in utopian social reform, hoping that visionary adjudication will bring about a more egalitarian, more caring, more civically responsible, or otherwise more perfect society. Others would turn to social science to generate new blueprints for law. Thus, feminist scholars have argued that law should be feminized,[1] or that society

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1. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1-4, 70-72 (1988).

should be restructured through legislation,[2] while economists have proposed comprehensive changes in entitlements.[3]

It is not my intention to evaluate the substance of these different scholarly programs, but only to show why they may be too extravagant in their ambitions for law. Of course, academic criticism of law can be as ambitious as it likes, since it can do little harm and may occasionally provide new insights and ideas. But the best forms of practical legal decision-making are limited in ways that force them to ingest new ideas slowly.

This argument is based on certain inherent characteristics of legal rules. Rules are designed to reduce error by prescribing actions that, in the run of cases, will produce better results than the subjects of rules would obtain if they judged for themselves what to do. At the same time, rules sometimes produce errors when applied to particular cases. If the sum of error under rules is less than the sum of error rules prevent, then the rule-making authority has reason to issue "serious" rules—rules to be followed in every case. Because rules are imperfect, however, the subjects of rules do not always have good reason to follow them. This means that the authority cannot achieve all that it would like to achieve through rules unless its subjects are somehow distracted from reasoned evaluation of what they ought to do. To some extent, the authority may be able to provide such distraction through sanctions or deception, but neither will be fully effective.

From these premises about the operation of legal rules, this paper draws some conservative conclusions. The most important of these is that the success of a legal system depends significantly on a habit of obedience among its subjects. The habit of obedience, however, may be disrupted if law ventures too far from prevailing practices and beliefs or upsets too many private expectations. This unsolvable problem dims the prospects for comprehensive social reform through law.

Throughout the analysis that follows, this paper takes a consequentialist approach to law. Without reaching any conclusions about the nature of personal morality, it assumes that law and government are consequentialist enterprises, designed to advance some

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2. *See, e.g.*, ANDREA DWORKIN & CATHERINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1988).

3. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (proposing that compensation for takings of property be replaced by a system of private insurance against the effects of government activities on property values). *See also* RICHARD A. POSNER, OVERCOMING LAW 11-21 (1995) (discussing legal "pragmatism" and law and economics). Posner acknowledges the importance of stable legal rules, and expressly disavows any wish to replace law with economic theory; yet he appears to have substantial faith in the ability of pragmatic judges to rationalize legal methods. *See id.*

set of goals and ideals by the most effective means. This leaves room for society to pursue a variety of objectives, including, among others, the freedom of individuals to pursue their own conceptions of a good and fair distribution of resources.

II. SERIOUS RULES

The first step in this argument is to defend the role of rules in a good legal system—one that supports a successful society and advances its values. As this article explains, a governing authority has reason not only to enact rules but also to present them as "serious" rules. That is, it has reason to direct its subjects to act in certain predetermined ways without considering whether its directions are correct when applied to a particular case.[4]

Serious rules stand in contrast to "rules of thumb," or advisory rules, which are offered to rule-followers as non-binding guides to action.[5] A rule of thumb is not really a rule at all, because one who understands a rule in this way is free to conclude that, with due regard for the advantages of a practice of rule-following, the rule nevertheless should be disregarded in the particular case at hand. A serious rule, in contrast, is not just a particularly weighty rule of thumb, but a rule to be followed without examining underlying reasons for action.

The quality of seriousness is closely related, but not identical, to the quality of determinateness.[6] A determinate rule is one that is easily

4. Larry Alexander and I have made this point elsewhere, as has Frederick Schauer. *See* LARRY ALEXANDER & EMILY SHERWIN, PAST IMPERFECT: RULES PRINCIPLES, AND THE DILEMMAS OF LAW ch. 5 (Duke Univ. Press, forthcoming 2000) [hereinafter ALEXANDER & SHERWIN, PAST IMPERFECT]; FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 93-100 (1991); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PENN. L. REV. 1191, 1194-99 (1994) [hereinafter Alexander & Sherwin, *Rules*]. *See also* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 16-19, 22-23, 30-33 (1979) (discussing "exclusionary reasons").

5. *See* SCHAUER, *supra* note 4, at 4-5, 94-100 (discussing rules of thumb and "rule-sensitive particularism"); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (discussing summary rules); Donald H. Regan, *Authority and Value: Reflections on Raz's* Morality of Freedom, 62 S. CAL. L. REV. 995, 1004 (1989) (discussing rules of thumb).

6. For arguments in defense of the capacity of words to carry determinate meaning, see SCHAUER, *supra* note 4, at 53-62; Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 568-70, 607-21 (1993). On the distinction between relatively determinate rules and relatively indeterminate "standards," see, *e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic*

understood and does not call for normative judgment. Unlike seriousness, determinateness is a matter of degree: a rule may be more or less certain in application, but it either is or is not a statement of what the actor ought to do. Yet, although determinateness differs from seriousness, it can undermine seriousness in an indirect way. If, for example, the authority moves from a rule "Do not make a statement you know to be false," to a rule "Do not engage in harmful deception," the notion of harmful deception will require normative interpretation and this, in turn, will entail some consideration of the reasons underlying the rule. The rule is still serious in that it requires people to avoid harmful deception (whatever that is understood to mean) without further deliberation. But its effect on conduct will not be as consistent as that of the rule of "Do not make a statement you know to be false." At some point, the rule may be so indeterminate that it is incapable of constraint, and so cannot be called a serious rule (such as: "Respect autonomy" or "Do what is best").

A. Reasons for Serious Rules

There are well-known reasons why a governing authority might issue rules of conduct, even if the authority and all its subjects agree on a common set of ends.[7] The first is a disparity in information. Rules can improve the performance of individual actors if the authority from which they come has greater knowledge or expertise than most of the actors to whom they are addressed. Examples are a doctor's advice about antibiotics, a weather service's order to evacuate, and customs that represent many generations' experience with what works well in common situations. To the extent that a law-making authority can gather or tap superior information, its subjects will better conform to their own ends by following the authority's rules.[8]

Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257, 261-71 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560-62 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1701-13 (1976).

7. For useful catalogues of reasons for rules, see TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM 49-58 (1996); JOSEPH RAZ, THE MORALITY OF FREEDOM 75 (1986); SCHAUER, *supra* note 4, at 135-66; Jules Coleman, *Authority and Reason, in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 287, 304-05 (Robert P. George ed., 1996).

8. *See* RAZ, *supra* note 7, at 70-80 (discussing the "normal justification" for authoritative rules and pointing out that superior wisdom is one source of justification); SCHAUER, *supra* note 4, at 149-55 (discussing decision-maker error); Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1718-19 (1989) (arguing that elites are superior rulemakers because they have access to special information or are better processors of information than private parties); Coleman, *supra* note 7, at 305 (citing superior information as a justification for rules).

If the information the authority possessed could somehow be conveyed to actors, then there would be no need for rules. But this is seldom possible. Consider, for example, a jury listening to medical evidence.[9] A doctor testifies that, in his opinion, the pain in the plaintiff's legs is caused by circulatory problems and is not the result of a collision between plaintiff and defendant. The doctor may explain his opinion, and he may even demonstrate by pointing out the affected area on a plastic model of a spine. But he cannot, in several hours' testimony, make the jury understand what he understands about circulation and spines. The main function of his explanatory testimony is to allow the jury to view his demeanor and evaluate his credibility as an expert. Even this is something they can only do intuitively. Because they do not understand the subject matter, they have no substantial basis for evaluating his expert competence. In the end, they will decide whether he seems to be honest and attended a well-known university. If they approve of him, they will accept whatever he says about the plaintiff's spine.[10] Thus, because of the difficulty of imparting expertise to unskilled audiences, the authority may prefer to issue a serious rule of conduct, rather than attempt to explain more complex reasons for action to the public.

A second, related reason why an authority might issue rules is that rules can counteract the effects of common cognitive errors. There is much evidence that, even given an ample body of information, the human mind cannot be counted on to reason in an orderly and accurate way. Cognitive scientists, most notably Daniel Kahneman and Amos Tversky, have shown how normally useful cognitive shortcuts such as "representativeness" (similarity, taken to indicate correlation) or "availability" (salience or familiarity, taken to indicate frequency) can lead to errors of judgment.[11]

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9. For a thorough examination of deference to expert testimony, see generally Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L. J. 1535 (1998).

10. *See id.* at 1539, 1616-30. Brewer suggests that nonexperts may be able to employ a form of abductive reasoning to assess expert testimony on the basis of experts' credentials, but ultimately finds this insufficient to ensure fair decision-making in legal proceedings. *See id.*

11. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 4-14 (Daniel Kahneman et al. eds., 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY]; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability, in* JUDGMENT UNDER UNCERTAINTY, *supra* at 163 [hereinafter Tversky

For example, we have a false sense of immunity against harm, as shown by the fact that a majority of people consider themselves better than average drivers and expect to live past eighty. Why might we see things this way? Because the most available data—our personal experience and the dramatic events we read about—suggest that accidents and death happen most often to other people.[12] We also grossly miscalculate the prevalence of different causes of death, ranking accident and disease equally when death from disease actually prevails by sixteen to one.[13] Why? Because the interesting deaths we read about in the newspaper are mainly accidents rather than deaths from disease.[14]

Another common type of error, on which a great deal of human energy has been spent, is the illusion that we can control chance events. A simple example is that gamblers place higher bets on the outcome of a dice throw when they have not yet thrown the dice than when the throw is complete but the result has not been revealed. This may not be a heuristic so much as the product of human desire to control the surrounding environment.[15]

& Kahneman, *Availability*].

12. *See* Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 11, at 463, 468-70.

13. *See id.* at 467.

14. *See id.* Similarly, we overestimate our own contributions to joint projects. In a study of husbands and wives, the spouses' combined assessments of responsibility for various tasks, obtained separately from each, almost always add up to more than 1.0. The likely reason is that each has a much easier time picturing his or her own effort. *See* Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 11, at 179, 183-85.

15. *See* Ellen J. Langer, *The Illusion of Control, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 11, at 231. The cognitive habits that produce these errors are not just sloppy practices that we ought to avoid—they are strategies that work more often than not. Similarities often do indicate a correlation, and the most familiar or readily available facts are often those that occur most frequently. Moreover, strategies of this kind are indispensable for creatures with limited time and energy. Even a minimal analysis of all the acts (and omissions) we engage in during the course of a day would leave us paralyzed. In effect, the cognitive biases Kahneman and Tversky describe are rules for judgment, which normally allow us to reach roughly accurate conclusions but sometimes lead us into trouble.

Howard Margolis makes a more radical point, arguing that our thought process is not a process of reasoning in the sense associated with mathematical logic. Rather, we "think" by means of "pattern recognition," a skill that has evolved in Darwinian fashion from the simplest neural responses to stimuli. When we face a new situation, certain features of that situation act as cues that prompt a more familiar pattern already lodged in memory, and so allow us to jump to an initial conclusion. Then we refine our judgment by a process of comparison with other known patterns, prompted by closer looks. In this way we might arrive at logic, but we do not engage in logic. *See* HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 1-6, 42-86 (1987). If Margolis is correct, then it is quite natural that we should form strong habits of mind that push us to see things in one way and inhibit us from seeing them in other, logically plausible ways. There is no use trying to avoid these habits, because pattern recognition is our basic mental process.

Cognitive patterns or strategies and the errors they produce become a justification for serious legal rules if the rule-making authority can predict and correct for common mistakes. For example, the authority might impose speed limits to rein in overconfident drivers, or more controversially, it might require seat belts. More controversial still, it might prohibit gambling to counteract the gambler's fallacy and the illusion of control.

Cognitive error cannot serve as a wide-ranging justification for serious rules, because a law-making authority is necessarily composed of individuals who can only hope to reason in the normal human way—that is, faultily. There are cases in which a central authority is specially situated to minimize cognitive error. For example, if the authority encounters many instances of the same problem and a correct response depends primarily on an assessment of risks, the authority has both the motive and the necessary scale of operation to verify its judgment with rigorous statistical analysis. On the other hand, when there is doubt about the variables that ought to be included in the calculation, there is no reason to equate authority with cognitive superiority. Speed limits are a good case for rules, gambling less so.

A third reason why a law-making authority might issue rules is to solve coordination problems that individual actors cannot overcome on their own.[16] The coordination problems most often addressed by law arise when each individual's reasons for action depend on the conduct of others.[17] The only effective solution to a problem of this kind is to adopt

16. On the coordination function of rules, see, for example, CAMPBELL, *supra* note 7, at 50, 53, 58; SCHAUER, *supra* note 4, at 163-66; RAZ, *supra* note 7, at 49-50; Coleman, *supra* note 7, at 304-05; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982).

17. Problems of coordination can also arise with respect to a single individual's reasons for action at different points in time, as in the case of procrastination or addiction. *See, e.g.*, RICHARD A. FUMERTON, REASON AND MORALITY: A DEFENSE OF THE EGOCENTRIC PERSPECTIVE 178-88 (1990) (discussing procrastination); THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 57-112 (1984) (discussing strategies of self-control and self-command); Scott J. Shapiro, Rules and Practical Reasoning, 138-209 (1996) (unpublished Ph.D. dissertation, Columbia University) (on file with author) (discussing various problems of self-constraint). For example, suppose you are living in a cold climate and you have just lost your last pair of gloves. You know there is more cold weather coming, but today is tolerably warm. If you have better things to do than shop for gloves, and you expect the stores will still be there tomorrow, it is not rational to spend time shopping. The difficulty is that the same is true every day. If you awake one day to a hard freeze, and find that you have no gloves, you have made a mistake. But it is difficult to say just how (or, more precisely, when) your calculations went wrong.

and follow a rule. In the simplest cases, there is little or no reason to act in one way or another, but there are powerful reasons why everyone should act alike. For example, to avoid chaos we need a common language and common rules to direct the flow of traffic. A law-making authority can solve problems of this kind simply by designating a rule for all to follow.

More commonly, actors have reason to act in one way or another, but the balance of reasons for action depends on what others are likely to do. In a group of any size, predicting the actions of others (whose reasons for action similarly depend on the actions of everyone else) is impossible to do. Therefore no one can make a sound choice. Again, a law-making authority can solve the problem by issuing rules. As long as the rules are generally followed, they will enable individuals to act in concert. Most legal rules governing conflicting activities or the use of scarce resources—that is, most of the private law of property, tort, and contract —are of this sort.

The three justifications for rules described above—the authority's superior expertise, common cognitive errors on the part of subjects, and the need for coordination—are based on the assumption that the rule-making authority and its subjects agree on the ends the authority is trying to achieve. Of course, this is not always the case, and divergent ends create another reason for rules. Individual ends may diverge from those of the authority in at least two ways. The individual may simply disagree with whatever ends the authority has adopted on behalf of society as a whole. For example, the authority may think it important that resources be distributed fairly evenly, while the individual may think it is important that resources be distributed to reward merit, or that resources be distributed to himself. Alternatively, the authority may establish an institution that all individuals would endorse in a state of Rawlsian ignorance about their own circumstances, but that does not serve the concrete interests of all people. Private property laws, for example, are designed to generate social goods, such as wealth, by the indirect means of allocating resources to individuals.[18] But not everyone

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In a sense, this is simply a problem of information (you should have checked the forecast) or of error in assessing risk. But the problem is complicated by time. You cannot coordinate your own actions because your reasons for action now are dependent on your reasons for action later, and you do not know what circumstances will shape your reasons for action at all the relevant points in time.

18. *See, e.g.*, JEREMY BENTHAM, THE THEORY OF LEGISLATION 111-18 (C.K. Ogden ed. & Richard Hildreth trans., Routlege & Kegan Paul Ltd. 1931) (discussing the contribution of property rights to utility); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32-35 (4th ed. 1992) (discussing the contribution of property rights to efficiency). Maximization of welfare through the creation of incentives for productive use of property is just one of the possible justifications for private property rights. For a survey

benefits from property laws. A person who controls a very small share of wealth and has little capacity to generate wealth by labor may place less weight than the authority does on societal prosperity. In either of these cases, the authority has reason to control the conduct of dissenters by means of rules.

Rules of this kind—that is, rules that settle disagreements about ends and values—can be viewed as coordination rules, if coordination is broadly understood to include social and political compromise.[19] If people differ about particular ends, but agree that settlement of their differences is more important than pursuit of the ends in question, then rules that impose a settlement serve a common interest in stability and mutual predictability that no one can pursue alone. Of course, there may be some who value pursuit of their own ends more than they value settlement of differences, in which case the rule simply imposes the will of the authority and those it represents on dissenters. It is not the purpose of this Article to explore the conditions in which an authority is justified in imposing its will in this way; therefore this Article assumes the authority acts only when conditions of political justice have been met.

B. Imperfections of Rules

In the ways just described, a governing authority may be able to improve the lives and well-being of its subjects by enacting rules of conduct. In many cases, however, rules in operation do not perfectly correspond to the reasons that led to their enactment. This is because the rules are necessarily blunt; in order to function as rules, they must translate reasons for action into specific instructions applicable to classes of cases.[20] It follows that strict compliance with rules will entail a certain amount of error, judged by the reasons on which the rules are based.[21]

Rules also produce "discontinuities" in law—differences in treatment

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of the topic, see LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 57-67 (1977).

19. *See* Postema, *supra* note 16, at 172-78 (stating that coordination must be mutually beneficial but need not be equally beneficial to all parties).

20. In Fred Schauer's terms, rules are "instantiation[s]" of broader "background justification[s]." SCHAUER, *supra* note 4, at 54 (emphasis omitted).

21. *See id.* at 31-34, 47-52 (discussing entrenchment of generalizations and accompanying qualities of underinclusiveness and overinclusiveness).

that seem arbitrary by the light of any theory under which law might be organized. This is easiest to see when the rule is consequentialist in origin. Suppose we have settled on a goal of maximizing *X*, which we consider to be an element of human welfare. We decide that *X* would be served by serious rule *A*: "Do not kill another person." In fact, we believe that on some occasions killing someone would maximize *X*, but we also think that people are likely to misjudge the relation of killing to *X*, and we expect that some people will not care about *X*, so we adopt the rule. We also decide to adopt rule *B*: "No one is required to save another from peril." Again, we think there will be cases in which requiring a rescue would advance *X*, but we are worried that a general duty to rescue would too often prevent individuals from pursuing their own projects. We also find that we are unable to refine a duty to rescue in a manageable way, so we adopt rule *B* as a serious rule.

One obvious result of serious rules *A* and *B* is that in some of the cases covered by their terms, they will forbid the action that best serves *X*. This is the ordinary problem of error due to the bluntness of rules. Another consequence is that there may be extreme applications of rule *A* and extreme applications of rule *B* that seem indistinguishable, and hence arbitrary, according to the underlying goal of maximizing *X*. When this is so, the consequentialist goal itself (maximize *X*) is embarrassed.

Consider the following example provided by Leo Katz. A hospital administrator cannot afford enough equipment to sustain all the patients who may need life support. Normally, rules *A* and *B* prevent him from disconnecting one patient's life support in order to save another who has a better chance of recovery. The hospital administrator then discovers another type of life support equipment, a machine that must be briefly disconnected and serviced every few days. The result suddenly changes. Once the machine is disconnected for service, there is no duty under rule *B* to reconnect it to the first, less promising patient. The hospital administrator is now free to save the second patient at the expense of the first. But, how can a consequentialist theory tolerate such disparate outcomes when the consequences at stake are precisely the same and the only difference lies in the mechanical features of the equipment?[22]

Katz suggests that discontinuities of this type discredit consequentialism, and can be explained much more easily by a deontological view of law and morality.[23] Yet, an authority that wants to enforce a moral law against those who do not understand or are not

22. *See* LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 58-59 (1996).

23. *See id.* at 56.

motivated by that law faces the same problem as the consequentialist authority: it must use rules that are blunter than, and even conflict with, the moral law. "Do not lie" may be a broader prohibition than is warranted by the principle of respect for autonomy, and in fact may sometimes prevent what is right to do (for example, it might be telling someone in a murderous rage that there is no gun in the drawer). Yet, if people who are not morally inclined are likely to misunderstand or take advantage of a more discriminating rule, the blunt rule, "Do not lie," may be the best form in which to cast a morally inspired law.

Another way in which rules introduce defects into law is by inhibiting change. If a rule promises to prevent errors in judgment more often than it causes errors by preempting judgment, the authority has reason to issue the rule. But if circumstances change or new and better ideas emerge while the rule remains in place, the favorable balance may no longer hold and the rule may do more harm than good.[24]

Of course, there are various escape routes from obsolete rules. If a rule appears to be causing too many erroneous results, the authority can repeal or amend it.[25] Short of this, there are informal ways to alter serious rules. Because no rule is perfectly determinate, there will always be some opportunity for adjustment through interpretation.[26] And at some point, the level of obedience by individual actors and of judicial enforcement is likely to drop if the rule is regularly producing bad results. Particularly in a democracy that protects speech and is prosperous enough to support a variety of commentaries on legal rules and judicial outcomes, obsolete rules cannot survive indefinitely.[27]

Nevertheless, serious rules have a conservative effect. An authority with broad responsibilities cannot be counted on to act quickly when

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24. This does not mean that a society that employs serious legal rules cannot improve itself or respond to change. First, nothing I have said suggests that law should consist entirely of serious, determinate rules. Rules are justified only when the authority has epistemic or cognitive advantages, or coordination is important, or the authority is acting to enforce a necessary political compromise. In areas that do not require immediate coordination and for which the authority does not have reliable information, a rule of thumb, or a standard too indeterminate to have serious effect, or a zone of adjudicatory discretion, may be a better solution.

25. *See* H.L.A. HART, THE CONCEPT OF LAW 90-91, 93 (1961) (discussing the static quality of primary rules and the need for secondary rules of change).

26. *See* SCHAUER, *supra* note 4, at 207-28 (discussing various approaches to interpretation of rules).

27. For the view that dissent needs affirmative support against the force of the status quo, see STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 91-120 (1999).

rules need correction. It may lag behind the insights of actors who are closer to the circumstances of daily life, and therefore fail to notice that a rule is performing poorly or to perceive that the rule could be improved with the help of new scientific or intellectual tools. The authority may also have a bureaucratic self-interest in maintaining established rules.[28] Meanwhile, the habit of obedience may lead individuals to continue complying and judges to continue enforcing rules for some time after the justification for the rules has lapsed.

Thus, a legal system that employs serious rules and wins general acceptance for its rules will be resistant to change, and this will add to the errors generated by rules. But this does not necessarily mean that rules are unjustified. If a rule can prevent more error than it will cause, it is rational for the authority to adopt the rule. And, if actors and judges are likely to err in judging when the rule is obsolete, and their errors of judgment are likely to exceed the errors of continuing compliance, the authority has reason to insist on compliance as long as the rule remains in place.

C. The Irrationality of Following Rules

A governing authority has good reasons to enact rules, and yet what the rules dictate will not always be the best course of action, all things considered. What this means is that, if rationality is understood to mean acting on one's best judgment on the balance of reasons for action as one perceives them, it may be irrational to comply with a good rule.[29] If actors were always correct in their assessment of when they ought to obey rules, this would not be a problem. The authority could simply cast its rules as advisory rules: follow this rule unless there is a good reason not to. But if actors are likely to err in judging when to obey, the rules will not be effective unless they are serious rules that demand compliance in every case. The result is a dilemma for law: even when rule-makers and their subjects agree on ends, it is rational for the rule-maker to insist on compliance but irrational (in the sense of rationality previously described) for subjects to comply.[30]

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28. *See* Clark, *supra* note 8, at 1719-20 (discussing agency costs of elite decision-making).

29. This point is made forcefully in Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1620, 1625-28 (1991). *See also* Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 873-83 (1989) (agreeing that rules cannot prevent actors from considering reasons for action, but suggesting that actors may be able to limit the scope of their reasoning processes); Regan, *supra* note 5, at 1006-18, 1028-31 (arguing that conscientious decision-makers cannot treat rules as conclusive reasons for action).

30. *See* ROLF SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 53-68 (1975)

To some extent, the enactment of a rule can alter its subjects' reasons for action and narrow the distance between the rule-maker's point of view and that of its subjects.[31] For example, if the actor understands that the rule is based on special information known to the rule-maker or on the rule-maker's ability to recognize and correct common biases, the actor has reason to think that what the rule requires is normally the right thing to do. The rule has epistemic value: it creates a reason for belief that one ought to follow it, and so indirectly a reason for action.[32]

In rare cases, the epistemic value of the rule is conclusive. For example, a small investor might adopt the following rule: "Buy only mutual funds that are indexed to reflect the market as a whole." This is a perfect rule (ex ante), because the pricing generated by the combined efforts of all investors is so comprehensive that no single investor could hope to do better except by random luck.[33] It is therefore rational for the investor to adopt the rule: he will do better over time by following it than he would do independently. Further—and this is the interesting feature of this case—it is rational to follow the rule unquestioningly. Compliance is always rational because the market is smarter than every investor, in every case, is.

More often, however, what the rule dictates is right for most but not all cases. The existence of such a rule may still affect the actor's reasons for action, but it will not provide the actor with a conclusive reason to obey. Consider, for example, an evacuation order issued by the weather service. The order is justified on the ground that the service has better information than most people have about the magnitude of an approaching storm and because people systemically underestimate the risk of harm from storms. Among those subject to the order are several

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(arguing that, while actors cannot suspend their rational judgment, they have reason to create institutions that force them to treat rules as reasons for action); SCHAUER, *supra* note 4, at 128-34 (assuming that it is sometimes irrational for actors to follow rules and nevertheless rational for the governing authority to impose and enforce the rules); Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 9-13 (1990) (arguing that an authority has reason to demand that actors treat rules as serious rules, although actors do not always have sufficient reason to obey).

31. For the view that rules can alter reasons for action, see Alexander, *supra* note 30, at 7-8; Postema, *supra* note 16, at 179-82; William Powers, Jr., *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory*, 26 U.C.L.A. L. REV. 1263, 1270-93 (1978).

32. *See* Hurd, *supra* note 29 at 1615-16 (discussing "theoretical authority" as a source of reasons for belief).

33. *See* JONATHAN R. MACEY, AN INTRODUCTION TO MODERN FINANCIAL THEORY 37-46, 59-75 (2d ed. 1998) (explaining the implications of stock market efficiency).

people who wrongly believe that their homes are strong enough to withstand any storm, and one who rightly believes that an elderly parent will suffer serious harm in a move. Overall, it is better to make the rule a serious rule (thereby saving those who are mistaken), than to make it an advisory rule (allowing the one who judged correctly to follow his judgment).

Yet, this does not ensure that the evacuees, as rational decision-makers, will follow the rule. The evacuees may understand perfectly well the reasons for the order, but if they are aware of the nature of rules, they will also understand that the order is imperfect: the direction it gives is correct for most cases but not for all. Thus, for each evacuee, the order creates a fairly strong reason to believe that most people are likely to err, but only a weak reason to believe that he himself has erred. If the evacuee is confident of his own judgment, he will assume that evacuation is right for others but not for him. In other words, an actor may approve of a rule, understand its virtues, and endorse its issuance, and nevertheless conclude that it would be wrong to comply.[34]

From the authority's point of view, the best course is still to issue a serious rule and demand compliance by all. It may be that evacuation is a mistake in the case of the elderly parent. If the authority could anticipate this mistake, the solution would be an exception to the rule. It is never possible to foresee all mistakes, and, as long as the errors the rule prevents (harm to those who miscalculate the risk of harm) exceeds the errors it causes (harm to an elderly parent), the authority should insist that everyone comply. In this way, the perspectives of the authority and its subjects diverge: the authority believes it has good reason to issue a serious rule and its subjects believe they have good reason to disobey.

Rules designed to solve coordination problems suffer from a similar difficulty. The value of a coordination rule is that it enables actors whose reasons for action depend on the actions of others to predict what those others will do. Therefore, enactment of the rule might be thought to create a reason to comply: any actor's violation of the rule will undermine, to some degree, the benefits of coordination.[35]

Again, there will be cases in which the new reason for action that arises from enactment of a coordination rule is conclusive, or nearly so. If the rule simply fixes a convention ("drive on the right"), most or all

34. Larry Alexander and I make this argument in greater detail in ALEXANDER & SHERWIN, PAST IMPERFECT, *supra* note 4, ch. 5, at 16-18.

35. *See* Postema, *supra* note 16, at 179-82 (explaining how conventions create reasons for action); Regan, *supra* note 5, at 1025-26 (arguing that a coordination rule creates a reason to believe that others will comply, and hence, indirectly, a reason to comply).

people will follow it because of the salience it gives to one of several equivalent options. That option promises coordination if everyone obeys, and no one has reason to disobey. There is therefore no divergence between the authority and its subjects and no need for a serious, as opposed to advisory, rule.

Typically, however, there will be reasons to disobey a coordination rule despite the benefits that it will yield if generally followed. Most rules of law are of this type. A system of property rights, for example, yields well-known benefits; and yet there are surely instances in which theft is justified by someone's personal exigency.

When the possibility exists that someone will have reason to disobey the rule, the rules have much less, if any, capacity to generate a reason for action. As long as everyone knows that there is sometimes a good reason to disobey, and also knows that they and others may err in judging just when there is such a reason to disobey, no one can safely assume that others will conform to the rule. This in turn means that one actor's violation of the rule will have little or no effect on the expected coordination benefits of the rule, because those benefits are already uncertain. As a result, actors may understand the potential coordinating benefits of the rule and approve of its enactment, and nevertheless conclude quite often that they have reason to violate it.[36] Meanwhile, if actors are frequently wrong in judging that they have reason to disobey, and if the coordination benefits that come with full compliance exceed the harm caused by compliance on the part of those who really ought to disobey, the rule-making authority has reason to insist that everyone obey. Once again, what a rational authority ought to require diverges from what rational actors ought to do.

For example, suppose the authority has enacted a rule, "Keep off the grass." You understand the benefits this rule will bring if it is obeyed and you prefer not to break the rule if your breaking it will undermine those benefits. It therefore appears that you have reason to obey. But if you proceed to consider that occasionally people will have reason to break the rule, and that more often people will think they have reason to break the rule, you may conclude that your own violation will not add much to the harm that otherwise is likely to occur. In this way, your proposed reason to obey may disappear. If you don't break the rule, someone else will. The rule-making authority, of course, would prefer

36. *See* ALEXANDER & SHERWIN, PAST IMPERFECT, *supra* note 4, at 23-25 (discussing rule-sensitive particularism as applied to coordination rules).

that you not engage in this line of thought. Therefore, although the authority might concede that a few people would have good reason to break the rule, it will prefer that everyone obey.[37]

The divergence between the authority's reasoning and that of its subjects is even clearer when rules are based on ends that some rule-subjects reject. If an actor disagrees with the immediate ends of the rule but values compromise, the problem is one of coordination. Because the existence of the rule does not ensure that others will comply, the actor's failure to comply is not likely to undermine an otherwise reliable compromise; therefore, the actor has little or no reason to comply. If, on the other hand, the actor does not value compromise, the rule has no effect at all on his reasons for action. Thus, from the actor's perspective, it is irrational to comply, while from the authority's perspective, the benefit of the rule will be lost unless everyone complies.

What has been said so far establishes the initial premises on which the rest of this paper, and in particular its conservative conclusions, are based. There are some instances, at least, in which the right choice for a rule-making authority is to insist on universal compliance with imperfect rules. If its subjects were left to decide for themselves when to obey, error and uncertainty would undermine the epistemic and coordinating value of its rules. At the same time, rule-subjects are sometimes right to disobey the rules. They are right to disobey because what the rules require is not always what they ought to do, all things considered.

The following sections of the paper will describe why neither enforcement of rules nor efforts to deceive rule-subjects about rules and sanctions can satisfactorily resolve the discrepancy between what the authority ought to demand and what its subjects ought to do in regard to rules. This will lead to the conclusion, which is that law is not a good medium for radical social change.

III. STRATEGIES OF SECURING COMPLIANCE WITH RULES, AND THEIR LIMITS

A. Enforcement

The argument so far is this: however rational it may be for a law-making authority to impose serious rules on its subjects, the inevitable

37. Something of this kind occurs in the context of voting: from the standpoint of any individual voter, it is irrational to vote, and yet from the standpoint of a democratic authority, it is best that all people vote. On the problem of voting and rational choice, see, for example, BRIAN BARRY, SOCIOLOGISTS, ECONOMISTS, AND DEMOCRACY 20 (1978); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2138-46 (1996).

errors of rules mean that it will not always be rational for subjects to obey. An individual actor may accept the authority's ultimate ends, endorse the set of rules it has enacted as the best means for collective pursuit of those ends, understand the risk of error and the bad example that rule violation might set for others, and still disagree with the result the rule requires in a given case. At the same time, the actor may be wrong, and if actors are wrong more often than not, the authority will prefer compliance in every case.

To narrow the distance between its subjects' reasoning and its own, the authority might impose sanctions on those who disobey. For a rational actor, the possibility of a sanction provides an additional reason (a reason of self-interest) to comply with a law that the actor would otherwise think it best to disobey. If the sanction is effectively designed and fully enforced, it will make compliance rational.[38]

In our own legal system, enforcement of rules is complicated by the practice of compensation. Rules are backed not only by the threat of punishment, but also by the promise of civil remedies for those who are harmed by legal wrongs. Victims are entitled, at the expense of wrongdoers, to remedies that will place them as nearly as possible in the positions they would have been in if no wrong had been done.[39]

There are at least two reasons why enforcement of rules through judicially administered remedies will never bring about a perfect correspondence between the authority's reasoning and that of its subjects. The most basic difficulty is that rules are not self-executing; they must be applied by judges who are themselves rational actors and who presumably think it wrong to punish a justified actor.[40] Rules

38. *See* POSNER, *supra* note 18, at 242-50 (discussing criminal sanctions and their effect on rational decision-making).

39. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 11-19 (2d ed. 1994) (providing materials and questions on the objective of restoring plaintiffs to their "rightful positions"); *see also* Emily L. Sherwin, *An Essay on Private Remedies*, 6 CAN. J.L. & JURIS. 89 (1993) (exploring reasons for private compensatory remedies). For influential views on corrective justice, see, for example, JULES L. COLEMAN, RISKS AND WRONGS 303-406 (1993); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 313-323 (1990); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (1992); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987); Ernest J. Weinrib, *Toward A Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983).

40. *See* Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203,

sometimes dictate the wrong result. When they do, it is not only irrational for actors to follow the rule, but also morally distasteful for judges to punish those who rightly disobey.[41]

Judges may be more alert than individual actors to the systemic consequences of disobedience, particularly when disobedience is left unpunished. They may understand that if they fail to enforce a rule against someone who was justified in violating the rule, this will encourage others who wrongly think that they are justified to violate the rule as well.[42] Yet there will be cases in which the judge believes that, even after due allowance is made for the systemic consequences of an unpunished violation, the violation was justified. And it is wrong for the judge to enforce the rule in these cases.

What this means is that as long as judges desire to act fairly and understand the imperfections of rules, the threat of sanctions will not bring about full compliance. If actors expect fair treatment from judges, then an actor who believes he is doing the right thing, based on the same set of reasons that led the authority to issue the rule, must also believe that a judge is unlikely to impose sanctions on him for disobedience. As a result, potential sanctions will not have much effect on the reasoning of a well-meaning actor.[43] Their effect will be limited to conscious "bad men"—those who know they are acting contrary to the reasons underlying the rules.

The authority might respond by insisting that judges enforce rules according to their terms in all cases and threatening to impose sanctions on judges who fail to enforce rules. If credible, this threat would make it rational for judges to enforce the rules, and actors accordingly would expect to be punished for all violations. But the same enforcement problems that affect rules recur at this level. If it appears to whomever

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2279-2321, 2323 (1992) (arguing for correspondence between the justifiability of acts and the justifiability of punishment).

41. The level of enforcement must be discounted further if judges respect principles of retributive justice that forbid punishment of those who did not intend or expect to do wrong. *See* Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84 (1990) (discussing retribution and mistake). *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9, 11-14, 17-25 (1960); Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179-82 (Ferdinand Schoeman ed., 1987).

42. *See* Hurd, *supra* note 40, at 2293-2310 (analyzing the effect of example on justification); Powers, *supra* note 31, at 1271-72 (discussing the problem of "contagion").

43. Even for a well-motivated actor, sanctions may have some effect if the actor is risk averse and anticipates that judges may err in determining whether the actor was justified in breaking the rule. Sanctions will not, however, be conclusive if the actor believes he is justified and believes a future judge will probably recognize his justification and refuse to enforce the rule.

judges that the judge in question was correct in refusing to enforce the rule, that person will be reluctant to impose sanctions on the disobedient judge.

A second problem in enforcing serious rules is the effect of full enforcement on the public's attitude toward law.[44] Apart from their role in securing compliance with rules, both civil and criminal remedies play an important part in maintaining public belief in the value of law. Respect for and allegiance to law are based at least in part on self-interest: people are most likely to accept law when they believe that a stable legal system has advantages for them or those they care about. Principal among those advantages is security of expectations: law provides order in people's relations with others.

On this view of law, the importance of remedies comes from a particular feature of human psychology, our tendency to respond more intensely to visible, proximate facts than to disembodied ideas. In other words, adjudication and accompanying criminal and civil remedies illuminate the value of law, by translating its benefits from the abstract to the particular. Punishment of individual defendants, and perhaps more important, compensation of individual victims for effects of legal wrongs, create a stronger sense of security than the notions of rights and deterrence can convey. Of course, not everyone who suffers a legal wrong ends up with a legal remedy: most people do not sue and those who do most often settle. Nevertheless, tales of adjudication are part of our popular culture, and they shape our attitudes toward law even when we ourselves are not involved.

The psychological impact of adjudicated cases almost certainly exceeds that of abstract knowledge of law or data on the deterrent effect of legal rules. One of the biases that affect human cognition is a bias in favor of readily "available" information. In making predictions or assessing the causes of events, our minds focus naturally on facts that are salient and easy to retrieve from memory, such as events that carry emotional interest.[45] What people learn about lawsuits from newspapers,

44. *See* HART, *supra* note 25, at 38-39, 55-56, 86-88 (discussing the "internal aspect" of rules, in which rules are accepted by their subjects as standards of conduct); Sherwin, *supra* note 39, at 101-03 (discussing the role of remedies in maintaining faith in law).

45. *See* BERTRAND RUSSELL, PHILOSOPHY 269 (1927) ("[P]opular induction depends upon the emotional interest of the instances, not upon their number."); Richard E. Nisbett et al., *Popular Induction: Information Is Not Necessarily Informative, in* KAHNEMAN & TVERSKY, JUDGMENT UNDER UNCERTAINTY, *supra* note 11, at 101, 111-15

television, or conversations with friends serves this function for law, giving them a more acute sense of legal rights than they could obtain by reading the Supreme Court Reporter or the Restatement of Torts.

With this in mind, suppose that a rule-making authority could induce its judges, by penalties or persuasion, to enforce rules in every case that came before them. This would help give serious effect to rules, but it would also draw public attention to the defects of rules. When the effect of rules is played out in engaging cases, the public will assess the results of adjudication and will disapprove of a legal system that enforces rules against individuals who have rightly disobeyed. Thus, while remedies heighten public awareness of the benefits of legal rules, they can also heighten the public's demand for remedial justice.

The result is a dilemma for the authority. Serious rules are the best means for guiding and coordinating conduct. At the same time, serious enforcement can affect public respect for law, and respect for law is important to the maintenance of serious legal rules. The less the public approves of the legal system, the less it will be inclined to accept its rules without exception.

The nature of the problem, as well as the strength of public and judicial response to remedial injustice, is illustrated by the history to date of California's "Three Strikes and You're Out" law.[46] In 1993, a twelve-year-old girl named Polly Klaas was abducted from her bedroom, raped, and killed by a man who had twice been convicted of kidnapping. The public was shocked by the story and joined Polly's father in demanding tougher sentences for repeat criminals.[47]

In March 1994, the California legislature responded with a mandatory sentencing law requiring a sentence of life in prison for any defendant who is convicted of a felony and has two prior convictions for "serious" or "violent" felonies. The third felony need not be serious or violent: the criminal is now "out."[48] As enacted, the law allowed prosecutors to strike prior convictions from the record "in furtherance of justice," but said nothing about discretion for judges.[49] Judges, after all, were the feckless invertebrates who caused the problem in the first place. In

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(discussing responses to abstract and concrete information); Kahneman & Tversky, *Availability*, *supra* note 11, at 163 (explaining the availability heuristic).

46. CAL. PENAL CODE §§ 667 (b)-(i), 1170.12 (1994 & Supp. 1999).

47. After Polly was killed, Marc Klaas voiced support for a "Three Strikes" ballot initiative sponsored by Mike Reynolds, whose daughter also had been murdered by previously convicted felons. *See* Jane Gross, *Drive to Keep Repeat Felons in Prison Gains in California*, N.Y. TIMES, Dec. 26, 1993, § 1, at 1; Vlae Kershner & Greg Lucas, *"3 Strikes" Leader Warns Assembly He Doesn't Want Ballot Measure Softened*, S.F. CHRON., Jan. 5, 1994, at A13.

48. *See* CAL. PENAL CODE §§ 667(c), (e)(1); 1170.12(a), (c)(1).

49. *See* CAL. PENAL CODE §§ 667(f)(2); 1170.12 (d)(2).

November of the same year, a substantially similar ballot initiative was approved by seventy-three percent of California voters.[50]

Before long, however, hard cases cropped up. One man stole a slice of pizza from some children at a pier,[51] another stole three chuck steaks from a grocery,[52] another was caught with one marijuana cigarette,[53] and another stole a beer.[54] Each of these crimes was a third strike, calling for twenty-five years to life. Judges regularly avoided the law by reducing felony charges to misdemeanors, striking priors, or holding particular applications of the law to be "cruel and unusual" punishment.[55] Even Polly Klaas's father called for leniency.[56] Finally, the California Supreme Court, hearing the appeal of a man caught in possession of a tiny amount of cocaine, "interpreted" the Three Strikes law to give judges the same discretion afforded to prosecutors to strike prior convictions.[57] This interpretation—a rather odd one in light of the law's evident purpose to impose discipline on lenient judges—was necessary, the California court said, to avoid constitutional problems relating to the separation of powers.[58]

It is not clear that the failure of the Three Strikes law to operate as a serious rule is a cause for regret. A law inspired by a dramatic story like that of Polly Klaas may not reflect the sort of superior information or reasoning that justifies an authority in issuing serious rules. Yet, even if we assume that the Three Strikes law was a good rule, one whose value

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50. Proposition 184 was approved on November 8, 1994 and codified as section 1170.12 of the California Penal Code. *See* Gordon Smith, *Voters Reject Smoking, Health-Care Initiatives*, SAN DIEGO UNION-TRIB., Nov. 9, 1994, at A3 (reporting initiative results).

51. *See* Theft *of Pizza Could Result in Life Imprisonment*, SAN DIEGO UNION-TRIB., Aug. 4, 1994, at A3.

52. *See* Nicholas Riccardi, *Stolen Shirt Among Possible Third Strikes: Prop. 184: Calling for Defeat of Tough Sentencing Initiative, Group Profiles 10 Offenders Who Could Get 25 Years to Life in Prison for Minor Crimes*, L.A. TIMES, Oct. 19, 1994, at B3.

53. *See* Michelle Locke, *Judge Balks at '3-Strikes' Sentencing: Penalty Is Too Harsh for Nonviolent Crime, He Says*, SAN DIEGO UNION-TRIB., July 22, 1994, at A3.

54. *See* Lorie Hearn, *Many Caught in '3-Strikes' Net: Petty Criminals Are Swept in Willy-Nilly with Serious Felons*, SAN DIEGO UNION-TRIB., June 19, 1994, at A1.

55. *See, e.g.*, Leslie Wolf, *Case Is Evidence that Tough Law Traps Judges Too*, SAN DIEGO UNION-TRIB., Oct. 16, 1994, at A1; Locke, *supra* note 53, at A3.

56. *See* Lou Cannon, *A Dark Side to 3-Strikes Laws*, WASH. POST, June 20, 1994, at A15; Jon Matthews, *Klaases Ask Governor to Replace '3 Strikes': They Prefer Measure Aimed More at Violence*, SAN DIEGO UNION-TRIB., Mar. 10, 1994, at A3.

57. *See* People v. Romero, 917 P.2d 628, 633-49 (Cal. 1996).

58. *See id.* at 633.

as a warning to convicted felons outweighed the errors it would sometimes produce, the picture of a man sent to prison for life for theft of a chuck steak creates a poor impression of law in action.

The problem of remedial justice is aggravated by the temporal circumstances of adjudication.[59] In a legal system that issues and enforces rules, rules come into play at three points: once when announced, again when individuals consult the rules in deciding how to act, and finally when a violation has occurred or a dispute has arisen and courts apply rules to adjust the positions of the actors involved. Between these points, time passes, the information available to decision-makers changes, and the field on which rules operate shifts from future to present to past. Initially, the rule-making authority acts prospectively, contemplating a range of events that have not yet materialized. Later, when individual actors refer to the rule in making decisions about their own conduct, a particular problem has taken shape, though it is not yet clear what the consequences of action will be. Later still, when a judge consults the rule to evaluate conduct, at least some of the effects of the actor's conduct are known.

As the decision-maker's perspective changes, what is at stake in the decision may change, or appear to change, as well. Some of the functions of rules, such as creation of incentives, are prospective by nature. Although adjudication under rules affects these functions, the prospective value of rules is likely to lose its salience at the time of adjudication. For example, a society may value both maximization of total wealth and improvement of the position of those with few resources. With an eye to wealth maximization, the governing authority may issue clear rules of entitlement and transfer designed to encourage enterprise and reassure the market that promises will be enforced. Yet these are forward-looking goals, which turn on the ability of rules to influence future conduct. Once a violation of property rights or a breach of contract has occurred, the damage is done and, between parties, the original objectives of property and contract rules are beside the point. Distributive considerations, which played little part in the enactment of the rules, may now appear in sharper focus.

Consider the case of *Panco v. Rogers*.[60] Mr. Panco, an elderly carpenter preparing to retire, signed a contract to sell the home he had built for himself and his wife. The price stated in the contract was $5,500, but Mr. Panco, who was deaf and had little schooling, believed the price to be $12,500. The mistake grew out of oral negotiations

59. *See* Sherwin, *supra* note 39, at 104-09 (discussing the relation between rights and remedies in an adjudicative setting).

60. Panco v. Rogers, 87 A.2d 770 (N.J. Super. Ct. Ch. Div. 1952).

between Mr. Rogers, the buyer, and Mrs. Panco, who was not skilled in English. Mr. Rogers, presumably acting in good faith, prepared a contract stating the price he had heard, and Mr. Panco signed without reading the agreement. The market value of the house was determined to be $10,000. When his daughter discovered the mistake, Mr. Panco promptly offered to return the buyers' down payment plus expenses, and asked to be excused from his obligation to convey. When Mr. Rogers refused, Mr. Panco sued to rescind the contract.[61] Applicable rules of contract law, however, limited rescission to relatively narrow and concrete circumstances such as fraud or mutual mistake, and afforded no relief for a unilateral error of this kind.[62] Should the court stand by the rules and enforce the contract, or should it allow Mr. Panco to avoid the contract and keep the tiny assets he had saved for retirement?

This is not simply a case in which the governing rule is too blunt. It may be that, taking into account the reasons for clarity and reliability in contract law, the negative effects of an exception outweigh the hardship to Mr. Panco, who might after all have been more careful. But the change in perspective, from forward-looking enactment of rules to backward-looking adjudication, makes the distributive elements of the case particularly appealing in comparison with efficiency. Focusing on Mr. Panco alone, incentives for efficient behavior are no longer at stake, because he had already acted. At the same time, sympathy for his position and distaste for Mr. Rogers's chilly response are very much in play.

The changes that occur between enactment and application of rules make it even more likely that strict enforcement will be unpalatable to both judges and observers. They also expose conflicts among the various ends an authority might wish to pursue through law. Ideally, the authority would like both to promote efficiency and rescue the unlucky Mr. Panco. Yet if future conduct and retrospective decisions are governed by a single rule, the authority must choose one set of goals over the other.

B. Deception

To work as effectively as possible, a legal system must sometimes use serious and determinate rules. Yet it will not always be rational for

61. *See id.* at 771-72.
62. *See id.* at 773.

individual actors to comply with rules, because rules do not dictate the right result for every case. In response, the rule-making authority may introduce sanctions to enforce its rules. But the unwillingness of judges to enforce rules strictly, the importance of remedial justice to the public's attitudes toward law, and the salience of different ends at the point of adjudication make it unlikely that sanctions will bring about full compliance with rules.

Alternatively, the authority may be able to enhance the serious effect of rules by engaging in several forms of deception. The simplest of these relates to rules themselves. As Larry Alexander and I have argued elsewhere, when a rule-making authority presents rules as serious rules to be obeyed in every case, rather than advisory rules, it deceives its subjects about the relationship between the rules and correct conduct.[63] It treats the rules as statements of what their subjects should do in every case covered, when in fact they are only rough translations of reasons for action, designed to obtain the best overall results.

Occasionally, the establishment of serious rules may involve active deception: officials may openly urge, although they know better, that it is personally right for everyone to obey the law in every case. More often, the posture of officials is better described as lack of candor. In issuing a rule, they do not disclose that there is a more abstract reason behind the rule, which the rule does not perfectly realize. Knowing that people are inclined to obey law from habit, convenience, or a sense of duty, they do not invite their subjects to consider whether the actions required by the rule are in line with its motives.

Perhaps even more often, there is no conscious deception or even lack of candor, because officials themselves accept rules at face value. Now the problem is one of self-deception. Both the authority and its subjects simply act on rules and either fail or refuse to analyze the motives behind them.[64] In any event, in administering rules as serious rules, officials cannot be simultaneously candid and reflective. They must either engage in esoteric decision-making, without disclosing the motives of rules to their subjects, or they must avoid thinking clearly about the reasons for the rules they issue.

Another form of deception in which the authority might engage relates to the grounds on which sanctions are imposed. Normally, laws act both as conduct rules, addressed to individual actors, and as decision rules, addressed to the judges who adjudicate disputes arising out of conduct. Yet, it might be possible to separate these two functions of rules.[65]

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63. *See* Alexander & Sherwin, *Rules, supra* note 4, at 1192, 1194-1201.
64. *See id.* at 1193 (discussing self-deception in regard to rules).
65. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic*

Consider, for example, Gerald Postema's interpretation of Bentham's ideal legal system. Bentham favored a detailed and comprehensive code of conduct rules, and at the same time suggested that judges should decide disputes according to their best utilitarian judgment, even if this meant disregarding the rules of the code.[66] To avoid the confusion that would result from contradictory bodies of law, however, Bentham suggested that judicial decisions should have no precedential effect.[67]

If the public is fully aware of both judicial decisions and codified rules—as Bentham insisted it should be—it is difficult to see how such a system could remain effective. The lack of correspondence between decisions and codified rules would undermine the objective of codification, which is to provide guidance and settle expectations.[68] Nevertheless, there is evidence that laws sometimes operate in much the way Bentham proposed. In at least some areas of law, there is a significant degree of "acoustic separation" between conduct rules and subsequent decisions, so that a variance between conduct rules and decision rules may often go unnoticed.[69] When this is the case, the rule-making authority can pursue goals that would otherwise be at odds by addressing different sets of rules to actors and to judges.

One striking example is the history of equity in English and American law. For about seven centuries, equity was both juridically and physically separate from law, existing first in the person of the Chancellor, and then more formally in the Court of Chancery.[70]

Separation in Criminal Law, 97 HARV. L. REV. 625, 625-34 (1984) (distinguishing between conduct and decision rules); *see also* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 147-56 (2d ed. 1980) (distinguishing between duty-imposing laws and sanction-imposing laws).

66. *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 405-06, 411, 448-52 (1986).

67. *See id.* at 404, 415, 418-19.

68. *See id.* at 453-57.

69. Meir Dan-Cohen coined the term "acoustic separation." Dan-Cohen, *supra* note 65, at 625. Dan-Cohen provides examples of acoustic separation and of what he calls "selective transmission" of conduct rules and decision rules in criminal law, such as hidden defenses and possibilities for leniency at different stages of the criminal process. *See id.* at 634-48. He also raises serious questions about the legitimacy of the practice of selective transmission. *See id.* at 665-77. *See also* Alexander & Sherwin, *Rules*, *supra* note 4, at 1213-22 (discussing the effects of official deception on autonomy and public debate).

70. For short histories of equity, see FREDERICK WILLIAM MAITLAND, EQUITY 2-10 (2d ed. 1920); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 675-707 (5th ed. 1956). The Chancellor was first a part of the King's entourage, then holder of the King's seal, then gradually took on judicial duties, giving special relief to

Chancery was said to follow the law as announced by the law courts, but in fact the Chancellor gave relief in some cases not covered by established legal forms of action and recognized some defenses that the law courts might not allow.[71] The early Chancellors were ecclesiastics, and throughout its history Chancery tended to favor notions of moral duty over legal technicality.[72]

It was no secret that two separate courts—law and equity—were applying rules in rather different ways. But a critical distinction was maintained. Unlike the courts of law, Chancery had no power to establish titles to property or otherwise to determine the legal status of the parties. Instead, the Chancellor simply acted on the "conscience" of the defendant, issuing personal decrees that directed the defendant to act or not to act in particular ways.[73] Because the Chancellor never attempted to alter the law, there was no direct conflict with the judgments of the law courts. Of course, the Chancellor possessed the power to commit the defendant to jail indefinitely if he disobeyed a decree.[74] Thus, as a practical matter, the directions given by the Chancellor prevailed over the rights and duties provided by law.[75] But in an era when form mattered, the formal division in function meant that there was no conflict between equity and law.[76]

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petitioners for whom no remedy existed at law. *See* MAITLAND, *supra* at 25; PLUCKNETT, *supra* at 180-81, 695-96.

71. *See* Tulk v. Moxhay, 41 Eng. Rep. 1143 (Ch. 1848) (disregarding the legal requirement of privity and holding a buyer of land to be bound by a servitude of which he had notice). *See generally* G.W. KEETON, AN INTRODUCTION TO EQUITY 22 (6th ed. 1965); MAITLAND, *supra* note 70, at 2-5; 4 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE 87-88, 1040-45 (Spencer W. Symons ed., 5th ed. 1994); EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS 101-26 (1989).

72. *See* MAITLAND, *supra* note 70, at 4-6; PLUCKNETT, *supra* note 70 at 685-886; 1 POMEROY, *supra* note 71, at 71-75; 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 299 (13th ed. 1886).

73. *See* DAN B. DOBBS, THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 62-63 (2d ed. 1993) (discussing powers of equity courts); MAITLAND, *supra* note 70, at 9-10 (discussing the relation between law and equity); KEETON, *supra* note 71, at 10-11, 17 (discussing the nature of equity decrees); 2 POMEROY, *supra* note 71, §§ 428-430 (discussing the maxim that equity acts in personam).

74. On the contempt powers of equity courts, see generally DOBBS, *supra* note 73, at 130-31, 135-59.

75. The power of the Chancellor to enjoin plaintiffs from bringing suit in the law courts was confirmed by a royal decree in 1616. *See* MAITLAND, *supra* note 70, at 10; PLUCKNETT, *supra* note 70, at 194, 699.

76. The mechanics and practice of early equity are illustrated in the case of J.R. v. M.P, Y.B. 37 Hen. VI 13, pl.3 (1459). J.R. had procured M.P.'s sealed note through a species of fraud. M.P. initiated proceedings against J.R. before the Chancellor, who ordered J.R. to deliver up M.P.'s note for cancellation and not to sue M.P. at law. When J.R. refused to comply, the Chancellor committed him to jail for contempt. J.R. (acting from jail) then sued M.P. in a court of law, to collect on the note. After some deliberation, the justices held that the equity decree, being solely a matter of advice to

This arrangement provided a very effective form of acoustic separation, at least as long as Chancery decrees were seldom published and its practice was shrouded in mystery. Courts claiming final authority in matters of law enforced a set of remarkably rigid rules, while the Chancellor quietly made adjustments in response to hardship or misbehavior. In this way, the Chancery was able to provide equity in the Aristotelian sense of correcting error in the application of rules, without directly challenging the rules.

The formal division between law and equity eroded in the nineteenth century and by the mid-twentieth century the two had merged in nearly all jurisdictions and were administered by a single court.[77] Yet even under merged procedures, a special set of equitable defenses—defenses such as hardship and "unclean hands"—may apply to historically equitable remedies, but not to the legal remedy of damages.[78] Consequently, a court may recognize a plaintiff's claim but refuse to enforce it by injunction or specific performance. If, as is often the case, damages are insufficient to give full relief, the result is that the plaintiff's underlying right turns out to be less valuable than the rules that define it might suggest.[79] The obscurity of the remedial doctrine,

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J.R.'s conscience, did not affect the legal validity of the note. J.R. remained free to collect, if he could manage it from jail. *See id.*

77. On the procedural merger of law and equity, see generally DOBBS, *supra* note 73, § 2.6(1); RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 461-80 (7th ed. 1997); 1 POMEROY, *supra* note 71, at 45-55.

78. On equitable defense, see DOBBS, *supra* note 73, at 66-85 (discussing equitable discretion and equitable defenses); YORIO, *supra* note 71, at 101-26 (surveying defenses to specific performance); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 254-60 (1991) (discussing equitable defenses).

Defenses to the plaintiff's underlying legal claim, and therefore to the remedy of damages, traditionally have been governed by more determinate rules such as the rules defining fraud. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 159-61 (1981) (discussing fraud and related defenses); Sherwin, *supra* at 265-67 (discussing legal defenses to contract enforcement). In contract law, the defense of unconscionability has blurred to some extent the distinction between legal and equitable defenses. *See, e.g.*, U.C.C. § 2-302 (1977) (unconscionability); RESTATEMENT (SECOND) OF CONTRACTS, *supra*, § 208 (unconscionability); Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487-89 (1967) (distinguishing between substantive and procedural unconscionability).

79. Consider the denouement of *Panco v. Rogers*, 87 A.2d 770 (N.J. Super. Ct. Ch. Div. 1952), the case of the deaf carpenter who signed away his retirement savings. The court finally determined that Mr. Panco was not entitled to rescission of the contract: Mr. Rogers was not guilty of fraud and the mistake was only a unilateral mistake by Mr. Panco. *See* 87 A.2d at 773. Therefore Mr. Panco was liable for damages for breach. Yet the court also denied Mr. Roger's counterclaim for specific performance, on the ground that "a judgment of specific performance would be harsh, oppressive, unjust,

however, creates a condition of acoustic separation: actors, and even lawyers, are unlikely to consider the possibility of inadequate remedies in advance of a dispute. This in turn permits the legal system to pursue two ends at once. It can provide guidance and incentives through clearly defined rights, and at the same time apply lenient decision rules in hard cases.[80]

Nevertheless, deception is not a promising solution to the irrationality of following rules. The two forms of deception I have described—deception about the nature of rules and deception about the relation between conduct rules and judicial decision—can help to give serious effect to rules. The first distracts actors from rational scrutiny of their actions under rules, and the second enables the authority to threaten full enforcement of rules without carrying through. Yet it should be obvious that deliberate deception is not a reliable strategy for bringing about compliance with legal rules. Official characterization of legal rules as serious rules may not convince actors that it is always correct to follow the rules. Discrepancies between conduct rules and decision rules may be noticed, and, if they are, there is a serious risk that the conduct rules will be undermined.

Moreover, it is unclear how an authority could carry out either of these strategies in a deliberate way. A small group of officials would need to be aware of the strategy to put it into effect, to keep it secret, and

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inequitable, and unfair." *Id.* at 774.

Of course, both damages and specific performance are designed to protect the buyer's expectancy, and in *Panco*, the results of the two remedies are theoretically the same. Damages are measured by the difference between the agreed price, $5500, and the market value, which was found to be $10,000. Thus, Mr. Panco pays $4500. Specific performance would mean that Mr. Panco received $5500 from Mr. Rogers in exchange for a house worth $10,000, a net loss for Mr. Panco of $4500. In practice, however, the two remedies may not produce identical results. Damages may be subject to special requirements of proof, to limits on idiosyncratic value, and to valuation by a jury, which might be reluctant to impose a large liability on Mr. Panco. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 351, 352 (1981) (discussing foreseeability as a limit on contract damages and certainty of proof of contract damages, respectively); RESTATEMENT (SECOND) OF TORTS § 911, cmt. e (1979) (stating damages are measured by claimant's subjective value, but do not include "sentimental" value); DOBBS, *supra* note 73, at 308-09 (discussing objective and subjective valuation); 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 240-46, 252-54 (1990) (discussing foreseeability and certainty).

Thus, the apparent rule—the conduct rule addressed to actors—is that in the event of a breach of contract, the promisee is entitled to the benefit of his bargain. Presumably, this reassurance encourages parties to enter into and rely on contracts. Yet the decision rule, which includes the choice between specific performance and less-than-adequate damages, permits some adjustment of final outcomes in response to cases like that of Mr. Panco. Further, the obscurity and complexity of this decision rule screen it from public view.

80. For a more detailed discussion of acoustic separation in contract enforcement, see Sherwin, *supra* note 78, at 300-14.

somehow to pass it on to future officials. And, even if all this could be done, any form of deception raises serious questions about the relationship between a governing authority and those who are subject to its rules. An authority that respects the autonomy of its subjects will be extremely reluctant to engage in deception.

The fact remains, therefore, that it is not rational for actors to follow rules in every case, even though full compliance will yield better results than particularistic decision-making. The rule-making authority cannot eliminate this problem through the imposition of sanctions; nor can it easily deceive its subjects about either the rules or the prospects for their enforcement. It can only hope that actors will deceive themselves, in the sense that they will not feel the need to deliberate in every case about whether to follow the rules.

IV. CONCLUSION: THE CONSERVATIVE IMPLICATIONS OF SERIOUS BUT IMPERFECT RULES

I have argued that, at least in some circumstances, legal rules will be most effective if they are treated as serious rules, to be obeyed in every case that falls within their terms. Because rules are blunt, the actions they require will not be correct in every case, judged by the ends the rules are designed to advance. Thus, full compliance with rules means that some errors will occur. It is also likely, however, that if people treat rules as advisory rules, they will make mistakes in judging when they are justified in violating the rules. And, if errors of this kind exceed the errors associated with full compliance, a serious rule is the better choice.

I have also argued that a legal system cannot rely on sanctions to bring about full compliance with rules. Rules must be administered by judges who, unless they enforce the rules without question, will be reluctant to impose sanctions on actors who were justified in breaking the rule. Moreover, the perception that rules are applied too strictly can undermine public respect for the legal system. Thus, although a threat of sanctions can alter the balance of reasons for action, the threat will not be credible to those who understand that rules are imperfect, believe that they are justified in breaking the rules, and believe that judges will not apply rules blindly.

Nor can a legal system rely on deliberate deception, either about rules or about sanctions, to bring about compliance with rules. Deliberate deception of the public by those who administer law is both impractical and risky. It may be that rule-subjects often deceive themselves,

assuming without reflection that it is right to follow rules and that rules will be enforced as written. But legal officials cannot easily or safely engineer this attitude toward rules.

What this suggests is that an unreflective habit of obedience to rules plays an important part in the success of a legal system. If we gave full rational scrutiny to legal rules, we would not always follow them, despite the possibility of sanctions, and we would not view them as reliable evidence of what we and others ought to do. Yet, most of us tend to obey the law fairly regularly, to feel guilty when we disobey, and to disapprove of others who disobey—all without much thought.

I do not want to overstate my case. Unreflective acceptance of and obedience to legal rules is not always essential to the effectiveness of law; nor is it always desirable. One qualification to the importance of habits of acceptance and obedience is that not all laws are or should be serious rules. When there is doubt about the justification for a serious rule—for example, if the authority's information is not clearly superior to that of individuals, or if the benefits of coordination might be overridden by the costs of conformity—the better choice may be no rule at all, or an indeterminate standard.[81] A standard that employs subjective or normative terms will not function as a serious rule because it is open to interpretation in context. But when the justification for a serious rule is uncertain, a standard allows the authority to defer to actors with special information ("salt to taste") or to customs and norms that reflect the experience of many actors ("act reasonably," when the content of reasonableness is informed by custom).[82]

There are also purposes for which advisory rules may be adequate, although serious rules would be better. When the justification for a rule is superior information in the hands of the authority or the likelihood of cognitive bias, even an advisory rule will have some effect on individuals' reasons for action. At least for those who are not confident that their own judgment is correct, such a rule is evidence of the authority's judgment that people are likely to err unless they follow the rule, which in turn provides some evidence that the actor himself is

81. *See, e.g.*, HART, *supra* note 25, at 124-32 (discussing the "open texture" of law); Ehrlich & Posner, *supra* note 6 at 266-67 (discussing the gradual development of judicial rules); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 599-601 (1992) (discussing matters that are not easily amenable to rules); Powers, *supra* note 31, at 1290 (noting that decision-makers may need time and experience before formalizing law).

82. *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines on Land Use Controls*, 40 U. CHI. L. REV. 681, 728-33 (1973) (favoring a standard of "neighborliness" in nuisance cases that takes its content from custom).

making a mistake.[83] To this extent, the rule can affect conduct even if it is treated as merely advisory.

In the case of coordination rules, however, it is important that rules are treated as serious rules, and therefore habits of acceptance and obedience may be quite important to the rules' effectiveness. The value of a coordination rule depends on the expectation that it will generally be obeyed. If the rule is treated as an advisory rule, not only will people sometimes have reason to disobey, but they also will sometimes err and disobey when they should not. This greatly dilutes the benefit of the rule, and may destroy it altogether if violations are so frequent that one more will make no difference. In contrast, if most people are in the habit of accepting legal rules as serious rules, actors who contemplate disobedience will realize that their violations will set a bad example and detract from the value of an otherwise effective rule. Thus, paradoxically, a widespread habit of obedience, not rational in itself, is necessary to make obedience to coordination rules rational.[84]

Coordination rules, moreover, make up a substantial and important part of law. Broadly understood, coordination encompasses not only specific enabling rules, such as rules governing contract formation, but also any rule designed to settle moral and political disagreements.[85] As long as subjects agree that the value of social peace exceeds the costs of complying with a rule with which they would otherwise disagree, their most important reason for action (peace) depends on coordination with others. Thus, rules defining property rights and legal wrongs, interpretations of the Constitution, and entitlements to social support can all fairly be viewed as coordination rules, if the value of compromise is sufficiently high. And, in each of these cases, coordination will be more effective and compromise more stable if most or all rule-subjects comply out of habit and general respect for law, without undertaking a full analysis of possible reasons to disobey.

Thus, habits of unreflective acceptance of and obedience to law contribute substantially to the success of a legal system. In my view, this observation about law has conservative implications. To the extent that law relies on habitual, unthinking acceptance on the part of its subjects, it is not a promising medium for dramatic social change.

A standard argument for restraint in legal interpretation and for

83. *See supra* text accompanying note 34.
84. *See supra* text accompanying notes 35-36.
85. *See* Postema, *supra* note 16, at 172-78 (defining coordination).

conservatism generally is that any change in established practices and institutions will have unintended consequences. Therefore, the best-intended reform may do more harm than good.[86] To some extent, the problems associated with rules support this standard argument, because they expose certain irrational features of the operation of law. If law cannot be fully rationalized, and if rules work best when some of their defects are ignored, then comprehensive reform through law is particularly risky.

This is not, however, the point I seek to make. Rather, the argument is a narrower one, which depends on the limitations on law's effectiveness rather than the riskiness of change. Rational and reflective actors will not always comply with rules, particularly rules designed to bring about coordination and compromise. Accordingly, as this Article has stated, the law must rely to a considerable extent on the public's disposition to accept legal rules as measures of correct conduct and obey legal rules without reflection. These habits in turn depend on the familiarity of the rules and the ability of actors to comply without sharply altering their beliefs of the patterns of their lives. If law changes too quickly or departs too radically from accepted views and practices, the necessary habits of acceptance and obedience are likely to be dissipated. Put another way, law may lose the very power that makes it so attractive to reformers if it is used too aggressively to bring about social change.

It might be argued that the best way to encourage a general disposition among actors to respect and follow legal rules is to make the law as morally attractive as possible—if necessary, by means of radical reform. Yet, while habits of obedience and acceptance depend in part on the quality of law, they also depend on convenience and complacence. As long as legal rules work tolerably well and can be readily assimilated to one's accustomed way of life, it is easier to comply without reflection

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86. *See, e.g.*, EDMUND BURKE, *Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London Relative to that Event* (1790), *reprinted in* EDMUND BURKE, SELECTED WRITINGS AND SPEECHES 424, 453-54 (Peter J. Stanlis ed., 1963). The author wrote:

> [T]he science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*. Nor is it a short experience that can instruct us in that practical science; because the real effects of moral causes are not always immediate.... [V]ery plausible schemes, with very pleasing commencements, have often shameful and lamentable conclusions.... The science of government being... a matter which requires experience, and even more experience that any person can gain in his whole life,... it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes.

Id. *See also* Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437, 456-57 (1990) (discussing the pitfalls of central planning).

than to think through the full set of reasons for action. When legal rules undertake to change the familiar social environment, actors may be shocked into a full analysis of whether they *ought* to obey. When they analyze rules in this way, they will not always obey; when they disobey, they may be wrong; and the benefits of rules will be lost if this occurs too often.

In our society, the disposition to obey law is probably strong enough to permit the use of law to bring about social change in exceptional cases. *Brown v. Board of Education*[87] and the anti-discrimination laws of the 1960s are obvious examples. But, if law is used routinely as a means to social reform, its foundation of acceptance is placed at risk. For example, there is evidence of increasing skepticism toward law in the area of sexual harassment.[88] The problem of sex has certainly caused major setbacks for working women. But public response to the Bill Clinton sex scandals suggests that strong legal constraints on sexual maneuvers at work are too far out of harmony with the way people are accustomed to behave. People laugh,[89] and, when they do, some damage is done to their attitudes toward law.

This argument applies equally to enacted law and judicial decisions. Unlike the standard conservative argument, however, it is limited to law and should not be taken as a discouragement to radical ideas. In fact, it implies a reason to support strong Constitutional freedoms that protect dissent, which we are fortunate to have in place. Law, in my view, is not a good means to accomplish social change. It can only respond to ideas that have already worked their way to acceptance through public debate. This makes protection of debate all the more important.

87. 347 U.S. 483 (1954).

88. *See, e.g.*, Jeffrey Rosen, *When Reckless Laws Team Up*, N.Y. TIMES, Jan. 25, 1998, § 4, at 15 (discussing sexual harassment laws and the independent counsel statute).

89. *See, e.g.*, Live Cam in the Oval Office (last visited July 25, 1999) <http://free.prohosting.com/~thumbs/ovalcam1.html>.